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February 2, 2015

By ECF

Hon. Paul A. Engelmayer
United States District Judge
United States District Court
Southern District of New York
40 Foley Square, Room 2201
New York, New York 10007

Re: Wallert v. Atlan, et al.
14 Civ. 4099 (PAE)

Dear Judge Engelmayer:

We represent the Plaintiff in the above-captioned matter. For the reasons set forth herein we request leave to file a Third Amended Complaint in this matter pursuant to Fed.R.Civ.P. 15(a)(2).

This is an action for copyright infringement involving musical compositions. The original Complaint was filed on June 6, 2014, and pursuant to leave of court, an Amended Complaint was filed on July 17, 2014. Pursuant to further leave of court, a Second Amended Complaint was filed on October 17, 2014, and subsequently served on all Defendants not already served with the prior complaints. Since the beginning of this case, Plaintiff has been in discussions with the counsel for various Defendants in the case for settlement or dismissal, and with respect to several Defendants both have been achieved. To date, no Defendant has answered, there has been no initial conference, nor has there been any discovery.

In its January 23, 2015 letter to the Court, counsel for Universal Music Publishing, Universal Music-MGB NA LLC and Universal Music Group, Inc. (the "Universal Defendants") opposed our prior request that the Court deem the Universal Defendants' Offer of Judgment ineffective. We dispute the arguments therein and continue to submit that the Offer of Judgment should be deemed ineffective and that Plaintiff is entitled to discovery of the revenues of the Universal Defendants.[1]

Contrary to the Universal Defendants' assertion in their letter to the Court, it is not well settled that the United States Copyright Act does not have extraterritorial application. More recent cases than those cited by the Universal Defendants' counsel demonstrate that this Court and others have articulated exceptions and allowed actions for copyright infringement occurring outside the United States. *See Armstrong v. Virgin Records, Ltd.*, 91 F.Supp.2d 628, 635-36 (S.D.N.Y. 2000); *Centrifugal Force, Inc. v. Softnet Communication, Inc.*, No. 08 Civ. 5463(CM)(GWG), 2009 WL 1059647, at *8 (S.D.N.Y. April 17, 2009); *Intelsat USA Sales Corp. v. Juch-Tech, Inc.*, 935 F.Supp.2d 101, 118-20 (D.D.C. 2013).

[1] Plaintiff respectfully submits that it is entitled to discovery of the Universal Defendants' revenues irrespective of whether there is subject matter jurisdiction over them. They are subject to this Court's personal jurisdiction and the information is relevant to the case. *See Armstrong v. Virgin Records, Ltd.*, 91 F.Supp.2d 628, 638-39 (S.D.N.Y. 2000).

Subject matter jurisdiction for copyright infringement may be exercised over foreign defendants in the following situations: (1) A predicate act of infringement that first occurs in the United States can justify the application of United States copyright laws to subsequent acts of infringement in a territory beyond U.S. borders; (2) A foreign defendant may be held liable for any acts that are committed abroad but are felt within the United States; and (3) If the defendant is contributorily or vicariously liable for another party's act of infringement in the United States, he can be sued for his contributory activity in the United States. *Centrifugal Force, Inc. v. Softnet Communication, Inc.*, at *8. The Universal Defendants' acts meet the second and third exceptions above.

The acts of infringement committed abroad are felt within the United States by damaging the market for Plaintiff's infringed song. This is demonstrated by the recording of the infringing song "Starlight" by the Italian artist Mango in 2011 (see further discussion below). There has also been extensive Internet streaming of the infringing song on YouTube and other sites. *See Capitol Records, LLC v. Videoegg, Inc.*, 611 F.Supp.2d 349, 362-63 (S.D.N.Y. 2009) (diminished value of copyrights held in New York State supports exercise of long-arm jurisdiction).

The Universal Defendants are also contributorily or vicariously liable for the direct infringing acts of their U.S. subpublisher and other licensed third parties within the United States. *Armstrong*, 91 F.Supp.2d 635.

Foreign infringers such as the Universal Defendants may also be sued in the United States for infringement under foreign copyright laws. *See Armstrong*, 91 F.Supp.2d 636-37 and case cited therein; *Carell v. Shubert Org., Inc.*, 104 F.Supp.2d 236, 258 (S.D.N.Y. 2000); *Frink Am., Inc. v. Champion Road Mach., Ltd.*, 961 F.Supp. 398, 404–05 (N.D.N.Y. 1997).

Since the beginning of this case, there has been confusion regarding the Universal entities involved in the alleged infringement, in what capacity and the extent of their involvement. Prior to the Second Amended Complaint, Plaintiff finally learned from the Universal Defendants the roles of US Universal and Universal France with respect to the infringing song. However, the lack of transparency and the confusion continues with respect to the correct Universal entities involved with the infringing song and a lack of clarity remains regarding who is being represented by counsel for the Universal Defendants. For example, in their letter to the Court, counsel refers to "Universal Music Publishing" but we do not know what type of legal entity this is, the country in which it is organized or how it connects to the other Universal entities.

Similarly, Plaintiff has only recently learned that all rights to the original master recording of Plaintiff's song are owned by Polydor Records, a subsidiary of Universal Music Group, who is the assignee of the original record distribution agreement between Plaintiff and RSO Records. Plaintiff believes that Polydor either licensed the master recording to one or more of the Defendants Atlan, LaFesse or Universal France or acquiesced in their infringing activity. Plaintiff has received no information or royalties for any license of the master recording, as he is entitled to pursuant to the original record distribution agreement. This action or inaction allowed an affiliated entity, Universal France, to financially benefit from the infringement to the damage of Plaintiff in terms of both lost record royalties and lost song publishing income. Plaintiff also believes that Universal France subpublished the infringing song and collected royalties in the countries discussed above through other Universal-affiliated companies.

As a result of the foregoing, Universal Music Group is contributorily or vicariously liable for the infringing acts of its affiliates. "A party may be liable for contributory copyright infringement if with knowledge of the infringing activity, the party induces, causes, or materially contributes to the infringing conduct of another." *Centrifugal Force, Inc. v. Softnet Communication, Inc.*, No. 08 Civ. 5463, 2011 WL744732, at *4 (S.D.N.Y. Mar. 1, 2011) (citation and internal quotation marks omitted). "A party is liable for vicarious infringement if it had a right and ability to supervise that coalesced with an obvious and direct financial interest in the exploitation of copyrighted materials. *Agence France Presse v. Morel*, No. 10 Civ. 2730, 2011 WL 147718, at *7 (S.D.N.Y. Jan. 14, 2011) (citation and internal quotation marks omitted).

The contributory or vicarious copyright infringement by Polydor and its parent also constitutes breach of the implied covenant of good faith and fair dealing in the master record distribution agreement to which they are successors in interest. By profiting at the expense of Plaintiff, Polydor and its parent are also liable for breach of their fiduciary duty to Plaintiff.

Plaintiff has also learned that "Starlight" was recorded and released by the Italian artist Mango in 2011 on his album entitled "La terra degli aquiloni." This album was released by Columbia/Sony, a defendant named in this action in the Second Claim of Plaintiff's Second Amended Complaint in connection with infringement of Plaintiff's song by a Turkish artist. Therefore, Plaintiff will also amend its claims against Columbia/Sony accordingly.

In view of all of the foregoing, we respectfully request leave to file a Second Amended Complaint and a Second Amended Summons pursuant to Fed.R.Civ.P. 15(a)(2).

We appreciate Your Honor's favorable consideration of this request.

Respectfully submitted,

D H CAVANAUGH ASSOCIATES

/Dennis H. Cavanaugh/
By:____________________________
Dennis H. Cavanaugh

cc: Nadine Y. From, Esq. (via email)